Filed 12/6/04 P. v. Catano CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HILARIO CATANO, Defendant and Appellant.	H026631 (Santa Clara County Super.Ct.No. CC117924)

Facing two pending cases with multiple charges, defendant Hilario Catano agreed to plead guilty to two felonies and to receive an eight-year prison sentence. He expressed no surprise or objection when he was advised that he would be ordered to pay a mandatory restitution fund fine between $200 and $10,000. At sentencing seven weeks later, he did not object to the probation report's recommendation or the trial court's imposition of restitution fines of $3,200 pursuant to the formula in Penal Code section 1202.4, subdivision (b)(2)[1] or to an equivalent fine suspended under section 1202.45.

At sentencing defendant did ask the trial court to "fire" his retained attorney. After hearing defendant's complaints, the trial court denied defendant's *Marsden*[2] motion. We will reverse the judgment in order to allow the trial court to properly

[1] Unspecified section references are to the Penal Code.

[2] *People* v. *Marsden* (1970) 2 Cal.3d 118.

evaluate defendant's request to discharge his retained attorney and to reconsider the amount of the restitution fine.

THE CHARGES AND CHANGE OF PLEA

After a preliminary examination, an information was filed on July 11, 2002, charging defendant with two felonies, possessing methamphetamine for sale (count 1—Health & Saf. Code, § 11378) while personally armed with a .22 caliber pistol (§ 12022, subd. (c)) after a prior conviction of possessing a controlled substance for sale (Health & Saf. Code, § 11370.2, subd. (c)), and possessing a firearm as an ex-felon (count 3—§ 12021, subd. (a)(1)), and a misdemeanor, being under the influence of methamphetamine (count 5—Health & Saf. Code, § 11550, subd. (a)).

Defendant's section 995 motion to dismiss the proceedings was denied on September 10, 2002. On January 16, 2003, the trial court announced a disposition of this case and an unrelated new felony matter charging that defendant possessed a controlled substance for sale while on bail. As described by the prosecutor, defendant would be pleading guilty to all charges and admitting all enhancements in this case in exchange for an agreed sentence of eight years, "no more, no less," and dismissal of the new charges. The codefendant, defendant's son, agreed to resolve the charges against him by plea agreement on the same day.

When asked by the court, defendant said that he understood the disposition and that he felt he had sufficient time to talk to his attorney about his case. Defendant waived his rights to trial, to confront and cross-examine witnesses, to remain silent, to testify on his own behalf, and to call witnesses.

At the court's request, the prosecutor advised the codefendants of the fines and fees as follows. "[Y]ou will be subject to certain fines and fees as a result of your guilty plea in this case. There will be a discretionary general fine of up to $10,000." "There will also be an additional restitution fine for being sentenced to prison." "There will also be a mandatory restitution fund fine between $200 and $10,000." "There will be an AIDS education fund fine up to $70." "There will also be a drug program fee of up to a $150 for each offense." "There will also be a lab fee of $50 for each offense."

Defendant indicated that he understood about the imposition of each of these fines and fees. Defendant then admitted guilt of the charges and the truth of the enhancements. There was no advisement pursuant to section 1192.5.[3]

In advance of sentencing, the probation report recommended, among other things, a restitution fine of $3,200 pursuant to the formula in section 1202.4, subdivision (b), an additional fine in the same amount suspended pursuant to section 1202.45, a $50 criminal laboratory fee for count 1 under Health and Safety Code section 11372.5 plus penalty assessment, a $150 drug program fee under Health and Safety Code section 11372.7 plus penalty assessment, and an additional $50 laboratory fee on count 5.

IN CAMERA HEARING

At the sentencing hearing on March 4, 2003, defendant's attorney, Curtis Rodriguez, advised the court that defendant wanted to "renounce the plea bargain" "on the ground that he believes the amount of time being offered is excessive." When asked by the court, defendant said he had not received good advice and had not been aware of what was going on throughout his case. Defendant said he had papers requesting another court date. The court viewed the papers and established that someone else had written them in English for defendant. The court observed, "These documents are preprinted. And then there is some fill in information that seems to suggest the defendant wishes to make a *Marsden* motion." "At this time I'm going to conduct a *Marsden* hearing." The court excluded everyone from the courtroom except defendant, his attorney, and the interpreter.

References to the Fifth and Sixth Amendments were preprinted on the documents. Handwritten on the documents was a request by defendant "to <u>fire</u> my Lawyer and get a

[3] Section 1192.5 requires a court to advise a defendant "prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

new one." (Original underscore.) Defendant complained in writing that his attorney was not doing his job and was not talking to defendant about his case. "Please could I see a nother [*sic*] Lawyer ASAP." "P.D." is written above "Lawyer."

The court asked defendant if he wanted to fire Mr. Rodriguez. Defendant said, "yes." Defendant said he or his family had paid Rodriguez. Defendant said he wanted to get rid of Rodriguez because they had not had much of a chance to talk. Rodriguez would not return his calls. Defendant did not know what was going on. Defendant did not hear about the eight-year offer until he came to court and Rodriguez encouraged him to take the bargain.

Mr. Rodriguez said they had spoken on many occasions since defendant was out on bail. Defendant understood what was going on though he did not want to accept it. Occasionally Rodriguez could not reach defendant because his telephone number had changed. The eight-year offer was from the court. The original offer was nine years. The bargain was made on the eve of trial.

When defendant had nothing more to say, the court stated: "Court deems the *Marsden* motion to be submitted. Relying on [*People v. Smith* (1993) 6 Cal.4th 684], the court is going to deny the *Marsden* motion and find that the defendant has made an insufficient showing for the court to rule in favor of the *Marsden* motion. Accordingly, the *Marsden* motion is denied."

SENTENCING

On March 4, 2003, after the in camera hearing, the court proceeded to sentence defendant, then 59 years old, to the agreed eight years in prison. The court imposed the midterm of two years for possessing methamphetamine, plus a consecutive three-year enhancement for being personally armed with a firearm, plus a consecutive three-year enhancement due to defendant's prior conviction of possession for sale. The midterm of two years for weapon possession was stayed pursuant to section 654.

The court ordered a "restitution fund fine of $3,200 pursuant to the formula permitted under Penal Code Section 1202.4[, subdivision](b)," an additional fine in the same amount suspended pursuant to section 1202.45, a $50 criminal laboratory fee for

count 1 under Health and Safety Code section 11372.5 plus penalty assessment, a $150 drug program fee under Health and Safety Code section 11372.7 plus penalty assessment, and an additional $50 laboratory fee on count 5.

Defendant did not object to imposition of any fines or fees.

According to the minute order and abstract of judgment, the penalty assessment on the $150 fee is $255, and the assessment on each $50 fee is $85.

1. MOTION TO DISCHARGE COUNSEL

On appeal defendant contends that the trial court abused its discretion by treating his motion to discharge his retained counsel as a *Marsden* motion.

A criminal defendant's attorney should be the embodiment of the defendant's Sixth Amendment right to the effective assistance of counsel. (Cf. *People v. Smith* (2003) 30 Cal.4th 581, 606.) Accordingly, a court must appoint substitute counsel either if the current appointed attorney is providing inadequate representation (*Marsden*, *supra*, 2 Cal.3d at p. 123) or the appointed attorney-client relationship has become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Fierro* (1991) 1 Cal.4th 173, 204; see *People v. Crandell* (1988) 46 Cal.3d 833, 854 [criticized on another ground by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365]; *People v. Lara* (2001) 86 Cal.App.4th 139, 150 [*Lara*].)

A defendant interested in discharging his retained attorney is not required to make the same showing required of a *Marsden* motion. As the California Supreme Court explained in *People v. Ortiz* (1990) 51 Cal.3d 975 (*Ortiz*), "While we do require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney is providing inadequate representation [citations], or that he and the attorney are embroiled in irreconcilable conflict [citation], we have never required a *nonindigent* criminal defendant to make such a showing in order to discharge his *retained* counsel." (*Id.* at p. 984.) The court concluded that it was error and reversible per se for the trial court to have required the defendant to have demonstrated the incompetence of his retained counsel before allowing his discharge upon a timely request. (*Id.* at pp. 987-988.) In other words, a *Marsden*

hearing is inappropriate when a defendant seeks to discharge his retained counsel. (*Lara*, *supra*, 86 Cal.App.4th at pp. 155-156.)

Ortiz stopped short of recognizing an absolute right to discharge retained counsel at any time. "The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*Ortiz*, *supra*, 51 Cal.3d at p. 983.) As stated in *Lara*: "The right to discharge retained counsel is not absolute, however, and the court may exercise discretion to ensure orderly and expeditious judicial administration if the defendant is 'unjustifiably dilatory or . . . arbitrarily desires to substitute counsel at the time of trial.'" (*Lara*, *supra*, 86 Cal.App.4th at p. 153.)

The Attorney General contends that defendant has waived his Sixth Amendment rights by failing to assert them. But defendant specifically told the trial court he wanted to fire his lawyer and mentioned the Sixth Amendment. We do not believe more is required to invoke defendant's constitutional right to counsel.

The Attorney General contends that the trial court proceeded appropriately under *People v. Smith, supra,* 6 Cal.4th 684 by treating defendant's request as one to withdraw his guilty plea on the grounds of ineffective representation. The general issue in *Smith* was: "When is a defendant entitled to the substitution of new counsel after conviction for future representation, including arguing, if appropriate, that the previous attorney was ineffective?" (*Id.* at p. 690.) Since the original attorney in *Smith* was appointed, *Marsden* provided the answer. (*Ibid.*) The specific issue in *Smith* "centers not on the ability of defendant to seek and obtain (upon a proper showing) substitute counsel at any stage of the proceeding in the trial court, but, more specifically, on whether there is a different and lesser standard postconviction than preconviction." (*Id.* at p. 693.) The court held there was not. "We thus hold that substitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to

replace the appointed attorney would substantially impair the right to assistance of counsel . . . ." (*Id.* at p. 696.)

As defendant points out, *Smith* involved substitution of appointed counsel. As *Ortiz* concluded, different rules apply to discharging retained counsel.

The Attorney General contends that there is no evidence that the court actually relied on *Marsden* grounds, other than by repeatedly mentioning *Marsden* and *Smith*. That is enough for us to conclude that the trial court treated defendant's request as a *Marsden* motion.

Finally, the Attorney General argues that defendant's request was properly denied because it was untimely and dilatory, coming as it did at sentencing. The same argument was deflected by *Lara*. When a trial court denies a defendant's request to discharge his retained counsel on *Marsden* grounds without considering the relevant factors of timeliness and possible prejudice, the court cannot be said to have exercised its discretion. "A court which is unaware of the scope of its discretionary powers can no more exercise informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Lara*, *supra*, 86 Cal.App.4th 139, 165-166.) When the defendant does not discuss and the trial court does not consider the relevant factors, "there is no way [for an appellate court] to determine whether allowing appellant to discharge his retained counsel and granting a continuance would have been prejudicial to the prosecution and disrupted the orderly process of justice." (*Id.* at pp. 163-164.)

We agree with the Attorney General that the appropriate remedy for this error is a limited remand allowing the trial court to determine, after considering the relevant factors, whether defendant's motion should be granted. This procedure is commonly followed when a trial court has conducted a deficient *Marsden* inquiry, as this court explained in *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400-1402.

Defendant points out that neither *Ortiz* nor *Lara* allowed for a limited remand. Since neither case considered this possibility, neither can be construed as rejecting it. Moreover, in *Ortiz* there was no possible basis for denying the defendant's request to

discharge his retained attorneys. "Defendant's motion, made after the mistrial and well before any second trial, was sufficiently timely; the timing reflects defendant's genuine concern about the adequacy of his defense rather than any intent to delay the retrial. On this showing, discharge of the Hernandezes would not have interfered with the 'orderly processes of justice.'" (*Ortiz*, *supra*, 51 Cal.3d at p. 987.) The same appears true of *Lara*. The appellate court indicated that the defendant's motion to discharge his attorneys, though made on the eve of trial, "informed the court of his concerns at the first possible opportunity." (*Lara*, *supra*, 86 Cal.App.4th at p. 163.)

When the defendant's request to replace retained counsel was timely as a matter of law, as in *Ortiz* and *Lara*, there is no need for a remand. In contrast, in this case at the change of plea hearing on January 16, 2003, defendant told the court he understood the disposition and had had sufficient time to talk to his attorney. It was not until 47 days later, at the time for sentencing on March 4, 2003, that defendant complained that he had been unable to talk enough with his retained attorney. We perceive a factual question whether this request to discharge counsel was timely or dilatory. Accordingly we deem a limited remand the appropriate remedy.

2. IMPOSITION AND AMOUNT OF RESTITUTION FINES

A. Imposition of restitution fines did not violate the plea bargain

Although defendant did not object in the trial court, on appeal he contends that "any lawfully imposed restitution fines under sections 1202.4[, subdivision] (b) and 1202.45 must be reduced to the statutory minimum of $200 under the compulsion of *People v. Walker* (1991) 54 Cal.3d 1013." There was a "failure to include, as part of the plea bargain, the discretionary imposition of the restitution fine."[4]

[4] Defendant does not complain about the imposition of a $50 criminal laboratory fee for count 1 (possession of methamphetamine for sale) under Health and Safety Code section 11372.5 plus penalty assessment of $85, a $150 drug program fee under Health and Safety Code section 11372.7 plus penalty assessment of $255, and an additional $50 laboratory fee on count 5 (being under the influence of methamphetamine) plus a penalty assessment of $85.

We recently analyzed *Walker* in *People v. Dickerson* (2004) 122 Cal.App.4th 1374 (*Dickerson*). Without restating the entire discussion, our conclusion was: "*Walker held* that '[t]he court should always admonish the defendant of the statutory minimum $100 and maximum $10,000 restitution fine as one of the consequences of *any* guilty plea, and should give the section 1192.5 admonition whenever required by that statute.' (*Walker*, *supra*, 54 Cal.3d 1013, 1030.) *Walker recommended* that '[c]ourts and the parties should take care to consider restitution fines during the plea negotiations.' (*Ibid.*) The court 'implicitly found that the defendant *in that case* reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.' (*In re Moser* [(1993)] 6 Cal.4th [342,] 356; [*People v.*] *McClellan* [(1993)] 6 Cal.4th [367,] 379-380, italics added.)

"But *Walker* should not be understood as finding that the restitution fine has been and will be the subject of plea negotiations in every criminal case. 'The parties to a plea agreement are free to make any lawful bargain they choose.' (*People v. Buttram* (2003) 30 Cal.4th 773, 785.) *Walker* does not prohibit criminal defendants from striking whatever bargains appear to be in their best interests, including leaving the imposition of fines to the discretion of the sentencing court." (*Dickerson*, *supra*, 122 Cal.App.4th at p. 1384.)

In *Dickerson*, we concluded that a defendant cannot establish that a later imposed fine violated his or her plea agreement without evidence that the agreement was for no fine or for a minimum fine within a statutory range. The trial court's failure to recite an agreement on the fine does not establish there was an agreement on a minimum fine. To the contrary, it suggests an implicit agreement that the imposition and amount of any fines was left to the discretion of the sentencing court. Such an implicit agreement is further confirmed when, prior to entering a guilty plea, a defendant acknowledges without objection that the court will impose fines of a stated amount.

In this case defendant did not object when the prosecutor advised him in open court that among the consequences of his guilty plea were: "There will also be an additional restitution fine for being sentenced to prison." "There will also be a

mandatory restitution fund fine between $200 and $10,000." Defendant did not object at sentencing to the probation report's recommendation of a restitution fine of $3,200 under section 1202.4, subdivision (b), with an equivalent fine suspended under section 1202.45. Defendant did not object when the trial court imposed these fines. As in *Dickerson*, we conclude that, under these circumstances, defendant's plea bargain expressly or implicitly left to the sentencing court's discretion the imposition and amount of restitution fines. There is no evidence that the fines imposed violated defendant's plea bargain.

To the extent that defendant separately complains about the lack of an advisement regarding a potential revocation fine under section 1202.45, we note that defendant was advised he would have to pay "an additional restitution fine for being sentenced to prison." This arguably referred to the additional restitution fine under section 1202.45. In any event, we conclude, as we did in *Dickerson*, that he forfeited this contention by not objecting at sentencing when this fine was imposed. (*Dickerson*, *supra*, 122 Cal.App.4th at pp. 1386-1387.)

B. Trial counsel should have objected to amount of the fines

Under section 1202.4, a sentencing court has discretion to set a restitution fine between $200 and $10,000 in light of all relevant factors, including "the seriousness and gravity of the offense and the circumstances of its commission."[5] (*People v. Derello* (1989) 211 Cal.App.3d 414, 427; *People v. Griffin* (1987) 193 Cal.App.3d 739, 741-742.) The court is not required to make express findings regarding the factors on which it relies. (§ 1202.4, subd. (d).) The court may even eliminate the minimum fine if "it finds

[5] Section 1202.4, subdivision (d) provides in part: "the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime." The fine should be "commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1).)

compelling and extraordinary reasons for . . . doing so, and states those reasons on the record." (§ 1202.4, subd. (c).)

The statute recommends a formula for calculating the fine. "In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2).)

In this case defendant admitted guilt of two felony counts (possessing methamphetamine for sale and possessing a weapon) and accepted a sentence of eight years. Applying the formula to these facts yields a fine of $3,200, if both convictions are counted. This was the amount recommended by the probation report and imposed, without objection, by the trial court.

On appeal defendant contends that his weapon possession conviction (count 3) should not have been factored into the calculations, because the trial court otherwise stayed punishment on that count pursuant to section 654 after enhancing defendant's sentence on count 1 (possession of methamphetamine for sale) three years due to defendant's being personally armed. Defendant further contends that his trial counsel was ineffective in failing to make this objection.

People v. Deloza (1998) 18 Cal.4th 585 explained the general principles at pages 591-592: "Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. (§ 654; *People v. Miller* (1977) 18 Cal.3d 873, 885.) If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. (*People v. Miller*, *supra*, 18 Cal.3d at p. 886.) Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. (*In re Wright* (1967) 65 Cal.2d 650, 652-655 [trial court erred in imposing concurrent sentences for two convictions for which section 654 prohibited multiple punishment].)"

As defendant points out, restitution fines are regarded as punishment. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-363; *Walker, supra,* 54 Cal.3d 1013, 1024.) We have been unable to find a case discussing whether a restitution fine is affected by the fact that it is imposed on a count otherwise stayed pursuant to section 654. There are cases upholding victim restitution awards based on dismissed counts and uncharged conduct, but in each of those either restitution was imposed as a condition of probation (*People v. Goulart* (1990) 224 Cal.App.3d 71, 79; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121-1122) or the defendant had expressly agreed by *People v. Harvey* (1979) 25 Cal.3d 754 waiver that the sentencing court could consider this other conduct. (*People v. Baumann* (1985) 176 Cal.App.3d 67, 75; *People v. DiMora* (1992) 10 Cal.App.4th 1545, 1550; *People v. Beck* (1993) 17 Cal.App.4th 209, 214-216; *People v. Campbell* (1994) 21 Cal.App.4th 825, 830.) Neither line of authority applies to the facts of this case.

The Attorney General argues that the plain language of the formula in section 1202.4, subdivision (b)(2) was intended by the Legislature to take "no account of whether the convictions have been stayed under section 654." It is true that the Legislature may create an exception to section 654 without specifically mentioning section 654. (*People v. Benson* (1998) 18 Cal.4th 24, 32.) But the Attorney General offers no reason why the Legislature would have desired to create an exception to the rule of section 654 and to predicate punitive restitution fines on stayed counts. In construing section 1202.4, we apply the rule that statutes should be harmonized, if possible. (*People v. McHenry* (2000) 77 Cal.App.4th 730, 733.) We conclude, when execution of a sentence on a count is stayed pursuant to section 654, then that count cannot be employed as a factor in calculating the restitution fund fine pursuant to the statutory formula in section 1202.4 subdivision (b). A different conclusion would effectively allow a defendant to be punished twice for an indivisible course of conduct.

The Attorney General further argues that the trial court had discretion to impose a restitution fine between $200 and $10,000, and the trial court might have arrived at the amount of $3,200 by other means than the recommended formula. We are unable to indulge in this presumption when the trial court stated that it was imposing a fine of

$3,200 "pursuant to the formula permitted under Penal Code section 1202.4[, subdivision] (b)." From this statement it appears that the court implicitly based $1,600 of the fine on stayed count 3, even though neither the probation report, the minute order, nor the judgment assigns any portion of the total fine to either of the two felony counts.

As we are remanding this case for other reasons, we need not determine whether defendant was prejudiced by his attorney's failure to object to the trial court's calculation of the restitution fine. The trial court will have another opportunity to calculate the restitution fines.

DISPOSITION

The judgment is reversed. The case is remanded to the trial court for a determination whether defendant's request to discharge his retained attorney should have been granted based on the relevant factors of the dilatoriness and disruptive potential of defendant's request. If the trial court denies this request, the trial court shall reconsider the amount of the restitution fine in resentencing defendant. If the trial court grants this request, defendant will be entitled to proceed with a new attorney.

Walsh, J.*

WE CONCUR:

Premo, Acting P.J.

Bamattre-Manoukian, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.